American Bar Association
www.supremecourtpreview.org

No. 07-513

IN THE
Supreme Court of the United States

BENNIE DEAN HERRING,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

Ronald W. Wise
2000 Interstate Park Dr., Suite 105
Montgomery, AL 36109

Thomas C. Goldstein
AKIN, GUMP, STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave. NW
Washington, DC 20036

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave., Suite 300
Bethesda, MD 20814

May 9, 2008

QUESTION PRESENTED

Whether the Fourth Amendment requires the suppression of evidence seized incident to a warrantless arrest for which there was no probable cause, conducted in sole reliance on an inaccurate report from other law enforcement personnel regarding the existence of an outstanding warrant.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISION 1

STATEMENT 2

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. THIS COURT HAS LONG REFUSED TO ALLOW THE GOVERNMENT TO INTRODUCE EVIDENCE IT HAS OBTAINED FROM A WARRANTLESS ARREST FOR WHICH THE POLICE LACKED PROBABLE CAUSE 12

II. THE EXCEPTION TO THE EXCLUSIONARY RULE FOR ILLEGAL SEARCHES THAT RESULT FROM JUDICIAL ERRORS DOES NOT APPLY TO ILLEGAL SEARCHES CAUSED BY POLICE ERRORS 18

A. *Leon* and *Sheppard* Depended on Officers' Reasonable Reliance on Judicial Errors 18

B. Like the Narrowly Drawn Exception to the Exclusionary Rule Recognized in *Leon* and *Sheppard*, the *Evans* Exception Rests on the Presence of Judicial Error 22

C. The Error at Issue Here Was Attributable Solely to Police Negligence, to Which This Court Has Consistently Applied the Exclusionary Rule 24

III. NOTHING ABOUT THE NATURE OF NEGLIGENT POLICE RECORDKEEPING JUSTIFIES CREATING AN EXCEPTION TO THE EXCLUSIONARY RULE..... 33

A. Permitting the Introduction of Evidence Obtained Because of Law Enforcement's Own Negligent Recordkeeping Would Create Perverse Incentives for Police Departments 34

B. No Alternative to Exclusion Can Produce Sufficient Incentives to Prevent Future Fourth Amendment Violations From the Use of Inaccurate Police Warrant Records... 42

CONCLUSION 49

TABLE OF AUTHORITIES

Cases

Alderman v. United States, 394 U.S. 165 (1969).....43
Arizona v. Evans, 514 U.S. 1 (1995).....passim
Arizona v. Roberson, 486 U.S. 675 (1988)....11, 30, 31
Austin v. State, 965 So. 2d 853 (Fla. Dist. Ct. App. 2007).....41
Beck v. Ohio, 379 U.S. 89 (1964).....20
Best v. State, 817 N.E. 2d 685 (Ind. Ct. App. 2004).....41
Bowers v. Hardwick, 478 U.S. 186 (1986).....34
Brady v. Maryland, 373 U.S. 83 (1963).....29, 31
Brinegar v. United States, 338 U.S. 160 (1949).....13
Carroll v. United States, 267 U.S. 132 (1925).....13
Commonwealth v. Vaughn, 117 S.W. 3d 109 (Ky. Ct. App. 2003).....41
Duckett v. City of Cedar Park, 950 F.2d 272 (5th Cir. 1992).....47
Edwards v. Arizona, 451 U.S. 477 (1981).....30, 31
Eldridge v. State, 817 So. 2d 884 (Fla. Dist. Ct. App. 2002).....41
Elkins v. United States, 364 U.S. 206 (1960)...passim
Franks v. Delaware, 483 U.S. 154 (1978).....37
Gerstein v. Pugh, 420 U.S. 103 (1975).....12
Groh v. Ramirez, 540 U.S. 551 (2004).....19
Harvey v. State, 469 S.E.2d 176 (Ga. 1996).....40
Henry v. United States, 361 U.S. 98 (1959).....20
Hoay v. State, 71 S.W.3d 573 (Ark. 2002).....39
Hudson v. Michigan, 547 U.S. 586 (2006)....10, 16, 17
Illinois v. Gates, 462 U.S. 213 (1983).....33
James v. Illinois, 493 U.S. 307 (1990).....16

Jibory v. City of Jacksonville, 920 So. 2d 666 (Fla. Dist. Ct. App. 2005).....41
Johnson v. United States, 333 U.S. 10 (1948).....34
Joyner v. Taylor, 968 S.W.2d 847 (Tenn. Ct. App. 1997).....41
Kaupp v. Texas, 538 U.S. 626 (2003).....16
Kyles v. Whitley, 514 U.S. 419 (1995).....11, 29, 30
Lauer v. Dahlberg, 717 F. Supp. 612 (N.D. Ill. 1989), *aff'd*, 907 F.2d 152 (7th Cir. 1990).....47
Mason v. Village of Babylon, 124 F. Supp. 2d 807 (E.D.N.Y. 2000).....47
Massachusetts v. Sheppard, 468 U.S. 981 (1984).....passim
McMillian v. Monroe County, Ala., 520 U.S. 781 (1997).....32, 46
Michigan v. Tucker, 417 U.S. 433 (1974).....43
Missouri v. Seibert, 542 U.S. 600 (2004).....39
Mitchell v. Aluisi, 872 F.2d 577 (4th Cir. 1989).....47
Ott v. State, 600 A.2d 111 (Md. 1992).....41
Park v. Valverde, 61 Cal. Rptr. 3d 895 (Cal. Ct. App. 2007).....41
People v. Ferguson, 134 Cal. Rptr. 2d 705 (Cal. Ct. App. 2003.....41
People v. Fields, 785 P.2d 611 (Colo. 1990).....38, 41
People v. Knight, No. CO38928, 2002 WL 31372151 (Cal. Ct. App. Oct. 22, 2002).....41
People v. McElhaney, 552 N.Y.S.2d 825 (N.Y. Sup. Ct. 1990).....41
People v. Ramirez, 668 P.2d 761 (Cal. 1983).....40
People v. Ridge, 57 Cal. Rptr. 2d 255 (Cal. Ct. App. 1996).....41
People v. Spence, 132 Cal. Rptr. 2d 621 (Cal. Ct. App. 2003).....41
People v. Willis, 46 P.3d 898 (Cal. 2002).....39, 41

Shadler v. State, 761 So. 2d 279 (Fla. 2000) 40, 41
Sibron v. New York, 392 U.S. 40 (1968).....16
Silverthorne Lumber Co., Inc., v. United States, 251 U.S. 385 (1920) 15, 17
Soto v. Bzdel, 214 F. Supp. 2d 69 (D. Mass. 2002).....47
State v. Allen, 690 N.W.2d 582 (Neb. 2005).....40
State v. Diloreto, 850 A.2d 1226 (N.J. 2004).....41
State v. Hisey, 723 N.W. 2d 99 (Neb. Ct. App. 2006).....41
State v. Mance, 918 P.2d 527 (Wash. Ct. App. 1996).....41
State v. Murphy, 793 So. 2d 112 (Fla. Dist. Ct. App. 2001) 41
State v. Sands, 802 So. 2d 417 (Fla. Dist. Ct. App. 2001) 41
State v. White, 660 So. 2d 664 (Fla. 1995) 41
State v. Williams, 583 N.W.2d 673 (Wis. Ct. App. 1998). 41
Taylor v. Alabama, 457 U.S. 687 (1982).....16
United States v. Anderson, No. 4:07cr0023, 2007 WL 4732033 (N.D. Ohio June 21, 2007) 41
United States v. Gines-Perez, 90 Fed. App'x 3 (1st Cir. 2004) 41
United States v. Grayson, 2006 U.S. Dist. LEXIS 44926 (N.D. Okla. June 30, 2006).....38, 41
United States v. Hensley, 469 U.S. 221 (1985) ..10, 28
United States v. Leon, 468 U.S. 897 (1984) ..... passim
United States v. Parker, No. 99-CR-123, 1999 WL 997282 (E.D.N.Y. 1999) 41
United States v. Rabinowitz, 339 U.S. 56 (1950).....14
United States v. Williams, No. 97-4849, 1998 WL 276460 (4th Cir. May 27, 1998).....41
Virginia v. Moore, No. 06-1082 (Apr. 23, 2008)..13, 14

Walder v. United States, 347 U.S. 62 (1954) 16
Weeks v. United States, 232 U.S. 383 (1914).....9, 14, 15, 33
White v. State, 989 S.W. 2d 108 (Tex. App. 1999) ...41
Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560 (1971).....passim
Wilson v. City of Boston, 421 F.3d 45 (1st Cir. 2005) 13, 47
Wong Sun v. United States, 371 U.S. 471 (1963) 16

Constitutional Provisions

U.S. Const. amend V. 30
U.S. Const. amend. IV.....passim

Statutes

18 U.S.C. § 922(g)(1).....6
21 U.S.C. § 844(a).....6
28 U.S.C. § 1254(1).....1
42 U.S.C. § 1983 46

Other Authorities

Billeaud, Jacques *Infrared Cameras Help Police Scan for Trouble*, L.A. Times, Sept. 9, 2007, at B7.....37
Brief of *Amici Curiae* in Support of Petitioner, *Arizona v. Evans* (No. 93-1660).....13
Burnham, David, *F.B.I. Says 12,000 Faulty Reports on Suspects Are Issued Each Day*, N.Y. Times, Aug. 25, 1985, at 1.....36
FBI, Press Release: National Crime Information Center Sets New Record (Jan. 17, 2006) 37
Guynes, Randall, & Russell Wolff, Un-served Arrest Warrants: An Exploratory Study (2004) ...35

Irons, Peter, The Courage of Their Convictions (1988) 35
LaFave, Wayne R., Search and Seizure (4th ed. 2004) 29
Laudon, Kenneth C., *Data Quality and Due Process in Large Interorganizational Record System*, Communications of the ACM, vol. 29 no.1 (Jan. 1986) 36
U.S. Congress, Office of Technology Assessment, *Federal Government Information Technology: Electronic Record Systems and Individual Privacy, OTA-CIT-296* (June 1986) 36
U.S. Dep't of Justice, Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2004 (2006) 35
U.S. Dep't of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2003 (2006) 36

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (Pet. App. 1a-12a) is published at 492 F.3d 1212. The district court's opinion explaining the denial of petitioner's motion to suppress (Pet. App. 13a-18a) is published at 451 F. Supp. 2d 1290.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2007. The petition for writ of certiorari was filed on October 11, 2007. This Court granted the petition on February 19, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

For nearly a century, this Court has applied the exclusionary rule in federal criminal prosecutions where the government seeks to rely on evidence it obtained as a direct result of unconstitutional law enforcement conduct. In this case, officers from the Coffee County, Alabama, Sheriff's Department arrested petitioner Bennie Dean Herring in violation of the Fourth Amendment. The sole basis for the officers' action was their incorrect belief that there was an outstanding warrant for petitioner's arrest – a belief that was entirely the product of an inaccurate report from other law enforcement personnel who had failed to properly maintain police department warrant records. Breaking from this Court's longstanding precedent, the courts below permitted the prosecution to introduce the evidence seized incident to that unconstitutional arrest.

1. On November 17, 2003, the Dale County, Alabama, Circuit Clerk's Office issued an arrest warrant for petitioner based on his failure to appear in court. J.A. 56. The warrant was sent, in the normal course of business, to the Dale County Sheriff's Department for execution. Personnel in the Sheriff's Office, which maintains its own records independent of the Court Clerk's office, J.A. 39, 43, logged the information regarding the warrant into the office computer. J.A. 38.

Because petitioner's residence was in a neighborhood at the boundary of three counties, the Dale County Sheriff's Department enlisted the help of two neighboring departments in serving the warrant. The Dale County Department initially sent

the warrant to Pike County for execution. J.A. 56-57. A few weeks later, when the Dale County Sheriff's warrant clerk determined that petitioner's house was not located in Pike County, she requested return of the physical warrant; at some point after the warrant arrived back at the Dale County department, she transferred it to the Coffee County Sheriff's Office. J.A. 57. After the warrant had been in Coffee County for "a couple of weeks or so," the Dale County department contacted the Coffee County department and requested that the warrant be returned to Dale County since Dale County law enforcement personnel "felt like they could locate Mr. Herring in Dale County." *Id.*

On February 2, 2004, the Dale County Circuit Clerk's Office recalled the arrest warrant. J.A. 60.[1] Dale County Sheriff's Office personnel physically removed the warrant from the department's files and returned the warrant to the Circuit Clerk's Office. *Id.*; Pet. App. 15a. Thus, as of February 2, 2004, there was no longer an outstanding warrant for petitioner's arrest. But due to a "breakdown" that occurred "someplace within the Sheriff's Department," J.A. 60, the department neglected to update its computerized records when it received and acted on the recall order. Pet. App. 4a, 15a. As a result of this failure, the computer file that the Dale County Sheriff's Office used as a ready reference for its active warrants did not reflect the fact that the court had recalled the warrant. Pet. App. 15a. To the contrary, the file continued to indicate

[1] While the precise reason for the recall does not appear in the record, petitioner testified without contradiction that the initial issuance of the warrant had been mistaken. J.A. 63.

(incorrectly) that an outstanding warrant existed for petitioner's arrest.

2. Five months later, on July 7, 2004, petitioner appeared at the Coffee County Sheriff's Department to retrieve some personal possessions from an impounded vehicle. Coffee County Investigator Mark Anderson, who was acquainted with petitioner,[2] learned that petitioner was in the impoundment lot. Anderson asked Sandy Pope, the Coffee County Sheriff's Office warrant clerk, to check her records to see whether there might be an outstanding warrant for petitioner's arrest. J.A. 18-19. When Pope told Anderson that there was no warrant in the Coffee County department's files, Anderson asked her to telephone the Dale County Sheriff's Department to see whether it had a warrant. *Id.*

Pope called her counterpart in the Dale County Sheriff's Office, Sharon Morgan, with whom she was in fairly regular contact. *Id.* at 43. When Pope asked her whether the Dale County Sheriff had a warrant for petitioner's arrest, Morgan checked her computer database and answered "Yes." *Id.* at 41. Pope told Anderson that a warrant existed, and then asked Morgan to retrieve the actual warrant and fax a copy to her. *Id.* at 35.

When Morgan checked the paper file, however, she could not find any arrest warrant for petitioner.

---

[2] Among other things, petitioner had repeatedly alleged to the district attorney that Anderson was involved in the unsolved murder of a local teenager. *See* J.A. 64-65. Shortly before the events leading to petitioner's arrest, Inspector Anderson and another officer had appeared at petitioner's house, pressing him to drop his complaints. *See id.*

Unable to locate any warrant, Morgan called the Dale County Circuit Court Clerk's Office, which informed her – just as it had informed her department some five months before – that the warrant had been recalled. *Id.* at 41-42, 59-60.

Investigator Anderson, however, had already left the Sheriff's Department in pursuit of petitioner, who had begun driving away from the impoundment lot. Less than a mile away, Anderson and a colleague, Deputy Neil Bradley, stopped petitioner. Bradley informed petitioner that he was under arrest. When petitioner asked "Under arrest for what?," Bradley told him: "There is a warrant on you in Dale County." *Id.* at 20. Although petitioner explained that he had recently seen the Dale County Circuit Judge and that no such warrant existed, *id.* at 63, 65, the officers nonetheless arrested petitioner immediately, *id.* at 20, rather than awaiting physical confirmation of the warrant from the Dale County Sheriff's Office. Having arrested and handcuffed petitioner, Anderson then performed a pat-down during which he found a small bag in petitioner's pocket with powder residue that tested positive for methamphetamine. *Id.* at 21-22. Bradley conducted a search incident to arrest of petitioner's truck that uncovered a handgun and ammunition. *Id.* at 22-23.

Pope received Morgan's telephone call informing her that no warrant existed while Anderson and Bradley were completing petitioner's arrest. *Id.* at 42. Pope then called and informed the officers, who were still at the scene of petitioner's arrest, that there was a "problem" with the reported warrant, *id.* at 26 – namely, that it did not exist.

3. Petitioner was indicted in the United States District Court for the Middle District of Alabama on charges of possessing methamphetamine and being a felon in possession of a firearm, in violation of 21 U.S.C. § 844(a) and 18 U.S.C. § 922(g)(1). Shortly thereafter, petitioner, proceeding *pro se* (but with standby counsel), moved to suppress all evidence of the methamphetamine and firearm as inadmissible fruits of his unlawful arrest.

The magistrate judge to whom the motion had been assigned recommended that petitioner's motion be denied. J.A. 66, 71.[3] He concluded that resolution of petitioner's motion was "governed by *Arizona v. Evans*, 514 U.S. 1 (1995)," J.A. 69, where this Court had held that evidence seized in violation of the Fourth Amendment need not be suppressed when the unconstitutional arrest has resulted from clerical errors by court personnel. According to the magistrate judge, the arresting officers and police department warrants clerks here were no more "inclined to ignore or subvert the Fourth Amendment" than the court personnel involved in *Evans*. J.A. 70 (quoting *Evans*, 514 U.S. at 14-15). Thus, exclusion was not required to achieve deterrence of future Fourth Amendment violations.

The district court accepted the magistrate judge's report and recommendation. Pet. App. 13a. The district court assumed that the arrest violated the Fourth Amendment, and accordingly framed the question before it as whether "the good-faith

---

[3] The magistrate judge also recommended granting petitioner's motion to suppress certain post-arrest statements for failure to give *Miranda* warnings. J.A. 70-71. That issue is not before the Court.

exception to the exclusionary rule, as articulated in *Evans* should be extended to mistakes by police personnel." *Id.* at 16a. The district court found that the error was "the fault of the Dale County Sheriff's Department, not that of the Dale County Clerk's Office." *Id.* at 15a. But it declined to suppress the evidence, given no showing of "routine problems with disposing of recalled warrants" in Dale County. *Id.* at 17a.

At trial, the government introduced the evidence that the officers had seized incident to petitioner's arrest. Ultimately, petitioner was convicted by a jury of both counts in the indictment. The district court sentenced him to 27 months' imprisonment.

4. The sole issue on appeal to the Eleventh Circuit was whether the district court had erred in admitting the evidence seized incident to petitioner's arrest. The court of appeals recognized that "[t]he searches of Herring's person and truck cannot be justified as incident to a lawful arrest because the arrest was not lawful. There was no probable cause for the arrest and the warrant had been rescinded. That means the searches violated Herring's Fourth Amendment rights." Pet. App. 5a. Nonetheless, the court of appeals held that the evidence should be admitted and affirmed petitioner's conviction and sentence.

The court of appeals rejected the government's argument that *Evans* itself justified the admission of the illegally obtained evidence in this case as "a red herring," *id.* at 6a, given *Evans*' express refusal to address the question whether an exception to the exclusionary rule should obtain when "police

personnel rather than court employees are the source of the error" leading to an unconstitutional arrest, *id.* at 7a (citing *Evans*, 514 U.S. at 15 n.5). Instead, the court of appeals looked to *United States v. Leon*, 468 U.S. 897 (1984). It interpreted *Leon* to require that three conditions be satisfied in order to apply the exclusionary rule to the fruits of an unlawful search and seizure. Pet. App. 9a. First, "there must be misconduct by the police or by adjuncts to the law enforcement team." *Id.* Second, application of the exclusionary rule must cause "appreciable deterrence" of such misconduct. *Id.* And third, "the benefits of the rule's application must not [sic] outweigh its costs." *Id.*

Although the Eleventh Circuit acknowledged that there was law enforcement misconduct in this case that satisfied the first condition of its test, it held that the second and third conditions were not satisfied. The Court of Appeals surmised that when one law enforcement agency acts negligently in providing information leading to an arrest to another department, it is unlikely that the exclusionary rule would deter sloppy recordkeeping because the cost would not fall on the responsible party. *Id.* at 11a. In addition, the Eleventh Circuit opined *sua sponte* that applying the exclusionary rule even in cases involving only one law enforcement agency "will not deter bad record keeping to any appreciable extent, if at all." *Id.* at 9a-10a.

The court advanced two main rationales in support of this hypothesis. First, the court asserted that excluding evidence in such cases would not deter negligent recordkeeping because "the conduct in question is a negligent failure to act" and

"[d]eterrents work best where the targeted conduct results from conscious decision making." *Id.* at 10a. Second, the Eleventh Circuit asserted that the police "already [have] abundant incentives for keeping records current." *Id.* Based on these rationales, the Eleventh Circuit concluded that any "minimal deterrence" the exclusionary rule might achieve against the type of law enforcement error in this case would not outweigh the cost of exclusion. *Id.* at 11a-12a.

SUMMARY OF ARGUMENT

This case involves a clear-cut violation of the Fourth Amendment. The police officers who arrested petitioner had neither a valid arrest warrant or probable cause to believe that he had committed any crime. Because law enforcement's own errors caused this unconstitutional arrest and its accompanying and equally unconstitutional search, the exclusionary rule requires that evidence that the officers gained from the search be suppressed.

I. Exclusion is the traditional remedy when, as here, the government seeks to introduce evidence it has obtained solely as a result of an unconstitutional search or seizure. *See, e.g., Weeks v. United States*, 232 U.S. 383 (1914); *Elkins v. United States*, 364 U.S. 206 (1960). This case fits that classic mold: but for the officers' unconstitutional arrest and search, they would not have found the evidence introduced at petitioner's trial. Applying the exclusionary rule thus properly returns the government to the *status quo ante*, precluding law enforcement from profiting from its own illegality. This result distinguishes this

case from the scenario in *Hudson v. Michigan*, 547 U.S. 586 (2006), in which the constitutional violation (the failure to knock and announce) had "nothing to do with the seizure of the evidence" because the officers would have obtained it anyway. *Id.* at 594. While this Court declined to enforce the exclusionary rule in *Hudson,* it has never wavered from the need to suppress evidence that law enforcement obtains directly and solely because of its own illegal conduct.

II. The "good faith" exceptions to the exclusionary rule adopted in *United States v. Leon*, 468 U.S. 897 (1984), *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), and *Arizona v. Evans*, 514 U.S. 1 (1995), do not apply to this case. Those cases all involved situations in which police acted in reasonable reliance on a judicial-branch representation that a warrant provided authorization for their action. There was accordingly no police misconduct in those cases to deter. By contrast, the judiciary in this case expressly informed the police that there was *no* judicial authorization to arrest petitioner. And nothing about the fact that the law enforcement agent who was aware of that notification was not one of the officers who actually arrested and searched petitioner in violation of the Fourth Amendment alters the equation. As this Court has often recognized, law enforcement personnel are collectively "engaged in the often competitive enterprise of ferreting out crime," *Evans,* 514 U.S. at 15, and they are collectively held responsible for relevant knowledge, *see, e.g.*, *United States v. Hensley*, 469 U.S. 221 (1985); *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560 (1971); *see also, e.g.*, *Kyles v. Whitley*, 514 U.S. 419 (1995);

Arizona v. Roberson, 486 U.S. 675 (1988). The exclusionary remedy applies collectively as well. *See, e.g.*, *Elkins v. United States*, 364 U.S. 206, 217 (1960).

III. Nor was the Eleventh Circuit justified in supposing, *sua sponte*, that the nature of the law enforcement error here – negligent recordkeeping – warrants suspending the exclusionary rule. It is well established that carelessness that leads to unjustified impingements on individual privacy can and should be deterred. Furthermore, cases involving inaccurate police recordkeeping may in fact be less amenable to alternative deterrence mechanisms, such as internal discipline or civil sanctions, than other types of police misconduct. One reason for this is that it may be impossible even to identify the responsible individuals in cases involving negligent recordkeeping – especially when the misconduct involves acts of omission. And even if the departmental employee who has failed to note the recall of a warrant can be identified, there may be a serious question of causation given the number of intervening actors and events that contributed to the unconstitutional arrest. The virtually certain availability of qualified immunity for the arresting officers themselves further undercuts the deterrent potential of civil liability.

Finally, contrary to the unsupported speculation of the court of appeals, law enforcement departments do not have a freestanding incentive to purge their records of recalled or stale warrants. To the contrary, if employees' laxity can lead to the discovery of admissible evidence that otherwise would be unavailable – as it will if this Court

abandons the exclusionary rule here – then departments will have a powerful reason to condone such behavior. Particularly given the increased use of coordinated law enforcement databases, and the troubling evidence of their potential for inaccuracy, this Court should reaffirm its longstanding position that evidence seized during unconstitutional searches that are the product solely of law enforcement negligence must be suppressed.

ARGUMENT

I. THIS COURT HAS LONG REFUSED TO ALLOW THE GOVERNMENT TO INTRODUCE EVIDENCE IT HAS OBTAINED FROM A WARRANTLESS ARREST FOR WHICH THE POLICE LACKED PROBABLE CAUSE.

1. There is no question that the arrest in this case violated the Fourth Amendment. At the core of the Fourth Amendment lies the basic proposition that the police may not arrest an individual if they have neither a valid arrest warrant issued by a judicial officer nor probable cause to believe that the individual has committed a crime. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975). The police here had neither. First, it is undisputed that at the time Investigator Anderson arrested petitioner, no valid warrant for petitioner's arrest existed. The purported warrant on which Anderson relied had been recalled by the issuing court over five months earlier. J.A. 59-60; *cf. Virginia v. Moore*, No. 06-1082, slip op. at 8 (Apr. 23, 2008) ("compliance with

[the warrant requirement] is readily determined (either there was or was not a warrant)"). Second, the sole basis the government identified for the decision to pursue, stop, and arrest petitioner was the reported existence of that warrant, *see* J.A. 20, 28, and there is no such thing as "probable cause to believe in the existence of an arrest warrant." *See, e.g., Wilson v. City of Boston*, 421 F.3d 45, 54-55 (1st Cir. 2005). "Probable cause" is a concept that refers to the underlying facts regarding a suspect's conduct, and not to how other officials have assessed those facts; it exists where "'the facts and circumstances within [police officers'] knowledge and of which they ha[ve] reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925) (third alteration in the original). Accordingly, this Court in *Arizona v. Evans* held that an arrest based upon an officer's reasonable but erroneous belief in the "existence of an outstanding arrest warrant" occurs "*in violation of the Fourth Amendment.*" 514 U.S. 1, 3-4 (1995) (emphasis added).[4]

2. Because the arrest in this case violated the Fourth Amendment, there is no dispute that the

---

[4] Tellingly, despite an *amicus* brief filed by a dozen states arguing that Evans' arrest "was constitutional," *see* Brief of *Amici Curiae* in Support of Petitioner at 10, *Arizona v. Evans* (No. 93-1660), not a single Justice adopted that position. The sole question that divided this Court was the propriety of excluding the evidence seized incident to an arrest that all Justices agreed violated the Fourth Amendment.

search of petitioner and his truck was also unconstitutional. While this Court has long recognized "the right on the part of the Government . . . to search the person of the accused when *legally* arrested to discover and seize the fruits or evidences of crime," *Weeks v. United States*, 232 U.S. 383, 392 (1914) (emphasis added), this Court has also emphasized that "[o]f course, a search without warrant incident to an arrest is dependent initially on a valid arrest." *United States v. Rabinowitz*, 339 U.S. 56, 60 (1950); *see also Moore*, slip op. at 11 ("officers may perform searches incident to *constitutionally permissible* arrests") (emphasis added). Thus, the court of appeals correctly held that "[t]he searches of Herring's person and truck cannot be justified as incident to a lawful arrest because the arrest was not lawful. There was no probable cause for the arrest and the warrant had been rescinded. That means the searches violated Herring's Fourth Amendment rights. . . ." Pet. App. 5a.

3. The sole issue before this Court is whether the fruits of law enforcement's unconstitutional conduct may be used as evidence against petitioner in a criminal prosecution. This Court's longstanding jurisprudence dictates that they may not.

Exclusion of illegally seized evidence is the traditional remedy when the federal government seeks to introduce evidence that law enforcement obtained as a result of its violating a defendant's Fourth Amendment rights. Nearly a century ago, this Court unanimously adopted the exclusionary rule for federal prosecutions. *Weeks*, 232 U.S. at 398. This Court explained that if something that

police seize without any legitimate justification can be introduced against a citizen in a criminal prosecution, then:

> the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Id. at 393.

Six years later, this Court again confronted a case in which the government, "while in form repudiating and condemning the illegal seizure, [sought] to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had." *Silverthorne Lumber Co., Inc., v. United States*, 251 U.S. 385, 391 (1920). Writing for the Court, Justice Holmes reaffirmed that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that [] evidence so acquired . . . shall not be used at all" in a criminal prosecution. *Id.* at 392; *see also Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (exclusionary rule is necessary to prevent Fourth Amendment from being "an empty promise").

In the present day, the "general rule in a criminal proceeding" remains "that statements and

other evidence obtained as a result of an unlawful warrantless arrest are suppressible if the link between the evidence and the unlawful conduct is not too attenuated." *INS v. Lopez-Mendez*, 468 U.S. 1032, 1040-41 (1984); *see also Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring in part and concurring in the judgment) (stating that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt").[5] Accordingly, this Court (and of course other federal and state courts) has continued to suppress the fruits of warrantless arrests where, as here, the government lacked probable cause to believe that the defendant had committed a crime.[6] Excluding evidence obtained through illegal warrantless searches "vindicate[s]" citizens' core constitutional entitlement to "shield 'their persons, houses, papers, and effects,' U.S. Const., Amdt. 4, from the

---

[5] To be sure, the exclusionary rule applies only to the prosecution's case-in-chief, *see, e.g., Walder v. United States*, 347 U.S. 62 (1954) (permitting the use of illegally obtained evidence for purposes of impeachment), and does not apply in proceedings other than criminal trials*, see Hudson*, 547 U.S. at 612 (Breyer, J., concurring) (collecting cases). These limitations on the scope of the exclusionary rule are not at issue in petitioner's case.

[6] For cases suppressing physical evidence discovered incident to warrantless arrests lacking probable cause, see, e.g.*, Sibron v. New York*, 392 U.S. 40, 62-63 (1968); *Wong Sun v. United States,* 371 U.S. 471, 484-88 (1963). For cases suppressing statements made incident to warrantless arrests without probable cause, see, e.g., *Kaupp v. Texas*, 538 U.S. 626, 632-33 (2003); *James v. Illinois*, 493 U.S. 307, 311 (1990); *Taylor v. Alabama*, 457 U.S. 687, 694 (1982).

government's scrutiny." *Hudson,* 547 U.S. at 593 (opinion of the Court).

As this Court has recently reiterated, the "remedial objective[]" of the exclusionary rule is deterrence of illegal police behavior. *Id.* at 591 (internal citation omitted). In *Hudson*, this Court distinguished violations of the knock-and-announce rule (since the police in such cases have a warrant that will entitle them to search in any event), from "cases excluding the fruits of unlawful warrantless searches," *id.* at 593, where constitutional violations can "produc[e] incriminating evidence that could not otherwise be obtained," *id.* at 596. While this Court concluded in *Hudson* that enforcement of the knock-and-announce rule "hardly require[s]" the "[m]assive deterrence" provided by the exclusionary rule, *id.* at 596, it has never wavered from the necessity of applying the exclusionary rule when police illegality is the only reason the government was able to seize evidence "otherwise it would not have had." *Silverthorne Lumber,* 251 U.S. at 391. In the latter situation, enforcing the exclusionary rule simply erases the improper "advantages" that the government gained by "doing the forbidden act" and returns the government to the same position it occupied before its negligent and unconstitutional conduct. *Id.* Any other approach would create incentives for the government to violate the Constitution in the hope of obtaining otherwise unavailable evidence.

II. THE EXCEPTION TO THE EXCLUSIONARY RULE FOR ILLEGAL SEARCHES THAT RESULT FROM JUDICIAL ERRORS DOES NOT APPLY TO ILLEGAL SEARCHES CAUSED BY POLICE ERRORS.

This Court has recognized some narrow exceptions to the exclusionary rule in situations in which the police lacked either a valid warrant or probable cause to make an arrest. In *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), this Court permitted the introduction of evidence the police seized in reasonable reliance on current search warrants later held to be invalid. In *Arizona v. Evans*, 514 U.S. 1 (1995), this Court permitted the introduction of evidence the police seized in reasonable reliance on a judicial official's mistaken representation that an arrest warrant existed. But this case involves an error that is different in kind, and not merely degree, from the errors in *Leon*, *Sheppard*, and *Evans*. Here, there was no *judicial* mistake at all; this case involves a Fourth Amendment violation caused solely by *law enforcement* negligence. Consequently, the exclusionary rule's time-honored principle that law enforcement should not be allowed to benefit from its own unconstitutional conduct controls.

A. *Leon* and *Sheppard* Depended on Officers' Reasonable Reliance on Judicial Errors.

In 1984, this Court recognized what is often called the "good-faith exception" to the exclusionary rule. *United States v. Leon*, 468 U.S. 897, 913 (1984). In *Leon* and its companion case,

Massachusetts v. Sheppard, 468 U.S. 981 (1984), this Court held that where officers have reasonably relied on an outstanding search warrant issued by a neutral and detached magistrate, the evidence seized under that warrant can be excepted from the exclusionary rule even if the warrant is subsequently determined to be invalid. In this case, by contrast, there was no such warrant.

1. In *Leon*, a state court judge issued a search warrant on the basis of a detailed affidavit prepared by an experienced and well-trained investigator. 468 U.S. at 902. Subsequently, however, a federal district court concluded that the warrant was invalid because the affidavit failed to establish probable cause under this Court's then-existing, but subsequently modified, test for assessing the reliability of an informant's tip. *See id.* at 904-05 & n.5. Thus, the district court suppressed the evidence obtained under the warrant. *Id.* at 904.

This Court, however, held that the exclusionary rule could be "modified somewhat" under the particular circumstances of the case. *Id.* at 905. While *Leon* is sometimes referred to as a case permitting a "'good faith' exception to the Fourth Amendment's general exclusionary rule," *Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004), that is not precisely accurate. To the contrary, this Court recognized that "'[good] faith on the part of the arresting officers is not enough.' If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Leon*, 468 U.S. at 915 n. 13 (quoting *Beck v. Ohio*,

379 U.S. 89, 97 (1964) and *Henry v. United States*, 361 U.S. 98, 102 (1959)). Rather, this Court held that the evidence at issue in *Leon* could be admitted because "the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion [was therefore] inappropriate." 468 U.S. at 926.

In reaching that conclusion, the Court emphasized that the primary goal of the exclusionary rule is the deterrence of unconstitutional police conduct. *See Leon*, 468 U.S. at 916. But when the police pursue a thorough investigation, then seek and obtain a warrant from a judicial officer with expertise in assessing probable cause, and ultimately execute the warrant in a procedurally proper way, "there is no *police* illegality . . . and thus nothing to deter." *Id.* at 921 (emphasis added). In other words, when police act not solely on their own initiative, but instead in reasonable reliance on the intervening probable cause determination of a neutral and detached magistrate, there is little reason to believe that exclusion of evidence that later turns out to have been seized illegally will "alter the behavior of individual law enforcement officers *or the policies of their departments*." *Id.* at 918 (emphasis added).[7]

---

[7] The Court explained later that:

> References to "officer" throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the

And because "[j]udges and magistrates are not adjuncts to the law enforcement team," but rather "neutral judicial officers" who "have no stake in the outcome of particular criminal prosecutions," *id.* at 917, the Court saw no reason to believe that exclusion was necessary to provide the appropriate incentives for judicial officers to comply with the Fourth Amendment's commands. *See also Mickens v. Taylor*, 535 U.S. 162, 173 (2002). (This Court "do[es] not presume that judges are as careless or as partial as those police officers who need the incentive of the exclusionary rule.").

2. *Sheppard* applied the reasoning in *Leon* to a situation in which the judge issuing a search warrant committed a "technical error," 468 U.S. at 984, that rendered the warrant as issued noncompliant with the Fourth Amendment's particularity requirement. The warrant in question was issued over the weekend and the appropriate forms were unavailable to either the police or the issuing judge. The requesting officer, who undeniably provided sufficient information to meet the probable cause requirement, *see id.* at 985, 989, explained this problem to the judge and requested that the judge make the necessary notations on the proffered form. The judge assured the officer that he had done so, but failed to make all the needed emendations. *Id.* at 928.

> basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. *See Whiteley v. Warden*, 401 U.S. 560, 568 (1971).

Leon, 468 U.S. at 923 n.24.

This Court held that suppression of evidence seized pursuant to the warrant was not required. Because "the police conduct in this case clearly was objectively reasonable and largely error-free[, a]n error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake." *Id.* at 990. The Court identified a principle of symmetry: "If an officer is required to accept at face value the judge's conclusion that a warrant form is invalid, there is little reason why he should be expected to disregard assurances that everything is all right, especially when he has alerted the judge to the potential problems." *Id.* at 990.[8] Thus, *Sheppard* reaffirmed the uncontroversial proposition that if a judge determines that a warrant is defective, the police cannot disregard that conclusion and continue to rely on the warrant anyway.

B. Like the Narrowly Drawn Exception to the Exclusionary Rule Recognized in *Leon* and *Sheppard*, the *Evans* Exception Rests on the Presence of Judicial Error.

Like *Leon* and *Sheppard*, *Arizona v. Evans*, 514 U.S. 1 (1995), presented a situation in which police acted in reasonable reliance on a judicial-branch

---

[8] As in *Leon*, the *Sheppard* exception to the exclusionary rule is narrowly drawn. The Court specifically reserved the question whether "an officer who is less familiar with the warrant application or who has unalleviated concerns about the proper scope of the search would be justified in failing to notice a defect like the one in the warrant in this case." 468 U.S. at 990 n.6.

representation that a warrant provided authorization for their action – this time, for an arrest.

In mid-December 1990, a Phoenix Justice of the Peace issued an arrest warrant for Evans for failure to appear in conjunction with several traffic violations. Evans appeared in court a week later, and the warrant was therefore quashed. Inexplicably, however, court personnel failed to notify the sheriff's office, so the warrant remained in the police computer database. 514 U.S. at 4. A month later, after a police officer noticed Evans driving the wrong way down a one-way street, and stopped him, a check of the database indicated an outstanding warrant, leading to Evans' arrest and an incident search that discovered a bag of marijuana in Evans' car.

Consistent with *Leon*, this Court held that because the arrest and search were the product of judicial error, suppression was not required. The Court explained that, like the state-court judge whose error ostensibly authorized the search in *Leon*, "court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime" and that as such "they have no stake in the outcome of particular criminal prosecutions." *Id.* at 15 (citations omitted). Therefore, "[a]pplication of the *Leon* framework supports a categorical exception to the exclusionary rule for *clerical errors of court employees*." *Id.* at 16 (emphasis added).[9]

---

[9] The Court specifically declined to address the question whether suppression would have been required if the error in

C. The Error at Issue Here Was Attributable Solely to Police Negligence, to Which This Court Has Consistently Applied the Exclusionary Rule.

This case differs from *Leon*, *Sheppard*, and *Evans* in a critical respect: while each of those cases involved an affirmative indication *from a court* that a warrant existed, this case involved an express indication from a court that *no* warrant existed. The decision to arrest petitioner, unlike the decisions to search Leon and Sheppard and to arrest and search Evans, was thus the product *entirely* of law enforcement's own errors and negligence. This Court has never before suggested that there should be any exception to the exclusionary rule when the error that produced otherwise-unavailable evidence is attributable solely to police department personnel. And contrary to the court of appeals' suggestion, the exclusionary rule retains full force regardless of whether one law enforcement agent violated the Fourth Amendment, or whether several agents collectively did so.

1. It is important to emphasize at the outset that the exclusionary rule would undoubtedly have applied had Inspector Anderson or Deputy Bradley personally known, at the time of petitioner's arrest, that the Dale County warrant had been recalled. An arrest and accompanying search conducted by an officer who knows that he lacks legal authorization presents the classic case of an officer acting illegally to obtain evidence he otherwise could not have

---

question had been attributable to police personnel. *Evans*, 514 U.S. at 16 n.5.

acquired. Only exclusion can sufficiently deter the incentives an officer would otherwise have to conduct such a search. *A fortiori*, suppression would be required if Anderson or Bradley, having been directly notified that the court had actually *recalled* petitioner's warrant, nonetheless had continued to rely on the now-invalid warrant as a justification for conducting the arrest and search.

2. In this case, that same relevant knowledge – that the previously issued warrant was now invalid – was undeniably within the possession of the police, but it was dispersed. *Some* law enforcement agent knew that the warrant had been recalled, because that person, having been contacted by the Dale County Circuit Clerk's Office, took the warrant out of the Sheriff's Office files and physically returned it to the court clerk. Pet. App. 12a; J.A. 60. That official then failed to notify his or her colleagues of the recall and failed to update the Sheriff's Office records to reflect the recall. As a result, the Dale County Sheriff's Department warrant clerk inaccurately told her counterpart in the Coffee County Sheriff's Office that a warrant existed, and the Coffee County Sheriff's Department clerk in turn repeated this inaccurate information to Anderson and Bradley, who arrested and searched petitioner.

The Court of Appeals held that the collective nature of the relevant knowledge here rendered the exclusionary rule inapplicable. Applying the exclusionary sanction here, it suggested, would be inappropriate because it "would scuttle a case brought by officers . . . . [who] were entirely innocent

of any wrongdoing or carelessness." Pet. App. 11a.[10] But this Court's decisions take the opposite position, holding that the dispersion of relevant knowledge among law enforcement agents who are acting in concert does not insulate their actions from customary Fourth Amendment principles.

For starters, this Court has squarely held that "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on [information from] fellow officers to make the arrest," no matter how reasonable that reliance. *Whiteley,* 401 U.S. at 568. In *Whiteley*, a sheriff in Carbon County obtained an arrest warrant for the petitioner. The sheriff provided literally no details supporting his application, thus rendering the underlying warrant invalid. But having obtained this invalid warrant, the Carbon County sheriff then broadcast the existence of the warrant statewide. Ultimately, a police officer in a different county arrested Whiteley in good-faith reliance on the Carbon County report, and conducted a search incident to that arrest. This Court held that the arrest and search violated the Fourth Amendment because it was not supported by probable cause, and thus "the evidence secured as an incident thereto

[10] Of course, the case here was brought by the United States, and not by any of the departments involved in conducting the underlying search and arrest. But surely, the Court of Appeals could not be taking the position that some version of the reverse silver-platter doctrine permits introduction of evidence in federal prosecutions on the basis that the illegal search was conducted by state or local police officers. *See also infra* pp. 28-29.

should have been excluded from [Whiteley's] trial." *Id.* at 569.

This Court has subsequently cautioned that *Whiteley* should not be read to stand for any global proposition that finding a Fourth Amendment violation is "synonymous" with requiring suppression. *Evans*, 514 U.S. at 13. But the Court has never cast any doubt on *Whiteley*'s holding that a Fourth Amendment violation occurred in the first place, nor on its holding that suppression was required under the circumstances of that case. Indeed, in *Leon*, this Court indicated that suppression remained an appropriate remedy in *Whiteley* itself: "Nothing in our opinion suggests," the Court emphasized, that an officer who obtained a warrant he *knew* to be invalid could "then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search." 468 at 923 n.24. Under those circumstances, the officer "will have no reasonable grounds for believing that the warrant was properly issued," and thus suppression would be warranted. *Id.* at 923.

This case is slightly different from the situation posed in *Whiteley* in that here the original law-enforcement error leading to the arrest was a failure to record the recall of a warrant, rather than obtaining a warrant based on clearly inadequate information. But to the extent this difference is relevant, it makes this case a stronger one for suppression. In *Whiteley*, a warrant at least existed. Here, it did not. Accordingly, the erroneous report of the Dale County warrant clerk that led to a violation of petitioner's Fourth Amendment rights is not

moderated by the fact that the illegal arrest was conducted by another member of the law enforcement team.

Whiteley likewise renders irrelevant the fact, highlighted by the Eleventh Circuit, *see* Pet. App. 11a. that the failure of communication here involved not just more than one law enforcement officer but more than one law enforcement department. *Whiteley* itself involved police officers from different offices in different counties. Furthermore, this Court's cases have long recognized that collective knowledge crosses jurisdictional lines. Thus, while police in one jurisdiction are entitled to rely on information from another jurisdiction to make an arrest, the "admissibility" of evidence seized in reliance on representations from another department "turns on whether the officers who *issued* the ['wanted'] flyer possessed probable cause to make the arrest." *United States v. Hensley*, 469 U.S. 221, 231 (1985). Here, the Dale County Sheriff's Department lacked probable cause, since it had been affirmatively notified of the warrant's recall and had physically returned the recalled warrant to the court. Thus, its lack of probable cause taints the arrest ultimately conducted by Coffee County police officers who relied entirely on Dale County's inaccurate representations.

Nor can the Eleventh Circuit's decision be squared with this Court's rejection long ago of the "silver-platter doctrine." In *Elkins v. United States*, 364 U.S. 206, 223 (1960), this Court held that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from -

unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial." *See also* 1 Wayne R. LaFave, Search and Seizure § 1.5(c) (4th ed. 2004) (noting that "[t]here does not currently appear to be any dispute" about the rule in *Elkins*). The Court noted that refusing to admit unconstitutionally acquired evidence, even in these cooperative cases, served the central deterrent purposes of the exclusionary rule. *See* 364 U.S. at 217. The same is true in this case, which involves a federal prosecution predicated on an unconstitutional search conducted by state officers.

3. Backing away from the general principle that law enforcement is charged with collective knowledge would not only contravene settled Fourth Amendment precedent; it would also contradict this Court's approach to other areas of constitutional criminal procedure. For example, prosecutors are compelled under *Brady* to produce "evidence favorable to the accused." *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (internal quotation omitted). The fact that an individual prosecutor is not himself personally aware of a particular piece of exculpatory or impeachment evidence does not relieve him of this duty – instead, "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

Such a collective knowledge approach is necessary because the agencies that are charged with the responsibilities of ferreting out and prosecuting crime are the entities best situated to

ensure full compliance with the law. Thus, charging individual prosecutors with knowledge of exculpatory information possessed by the police with respect to prosecutorial *Brady* obligations is appropriate because there is not "any serious doubt that procedures and regulations can be established . . . to insure communication of all relevant information on each case to every lawyer who deals with it." *Kyles*, 514 U.S. at 438 (internal quotation and citation omitted).

This Court has taken a similar position with respect to violations of *Edwards v. Arizona*, 451 U.S. 477 (1981), under the Fifth Amendment. In *Arizona v. Roberson*, 486 U.S. 675 (1988), for example, this Court attached "*no* significance" to the fact that the second officer who interrogated the defendant was unaware that he had invoked his right to counsel during a prior interrogation by another officer. *Id.* at 687 (emphasis added):

> [C]ustodial interrogation must be conducted pursuant to established procedures, and those procedures in turn must enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel. . . . Whether a contemplated reinterrogation concerns the same or a different offense, *or whether the same or different law enforcement authorities are involved in the second investigation*, the same need to determine whether the suspect has requested counsel exists. The police department's failure to honor that request cannot be

> justified by the lack of diligence of a particular officer.

Id. at 687-88 (emphasis added).

Just as allowing *prosecutors* to disclaim collective knowledge to escape the requirements of *Brady* or permitting *interrogators* to disclaim collective knowledge to escape the requirements of *Edwards* would violate the rights of criminal defendants, so too would citizens' rights be violated by permitting arresting officers to disclaim collective knowledge about a court's decision to recall a previously issued warrant. Since police departments are obligated to respect the Fourth Amendment, it is fair and reasonable to expect them to establish procedures and regulations to insure communication of all relevant information regarding the status of a warrant to every officer who seeks to rely on that warrant. In this case, Alabama sheriff's departments maintained a system that led to the violation of petitioner's Fourth Amendment rights; application of the exclusionary rule will appropriately place the burden of compliance with the Fourth Amendment on the Alabama law enforcement community.

4. The facts of this case reinforce the conclusion that the errors of Dale County Sheriff's Office personnel are fairly chargeable to the officers who arrested petitioner. The record shows that the county sheriff's departments cooperate regularly and in this case coordinated their activities to execute this warrant. Moreover, the legal structure of law enforcement in Alabama confirms the unified nature of the law-enforcement process. Thus, because the Dale County Sheriff's Office was informed that the

warrant against petitioner had been recalled, that knowledge must be imputed to the officers who relied on that department's communications as the sole basis for their actions.

The warrant at issue in this case spent time in three separate counties in the two and a half months during which it was valid. *See supra* pp. 2-3. The repeated transfers in such a short period of time show that these Alabama sheriff's departments were involved in a concerted law-enforcement effort. The fact that the warrant could be so actively pursued and so assiduously followed by three separate counties for the brief time it was valid further underscores the importance of treating these counties as a single law enforcement entity.

Furthermore, Alabama law treats sheriff's departments not as separate county-level entities but as part of a statewide system. As this Court recognized in *McMillian v. Monroe County, Ala.*, 520 U.S. 781 (1997), an Alabama county sheriff, when executing his law enforcement duties, represents the State of Alabama, not his county. The Court pointed to a number of provisions of both the Alabama Constitution and the Alabama Code that showed that Alabama county sheriffs are part of a coordinated, statewide law enforcement enterprise, *see id.* at 786-93, and concluded that they should not be conceived of as county officials. Particularly in light of that conclusion, this Court should not allow one agent of that statewide enterprise to overcome the protections of the Fourth Amendment by relying on the erroneous information provided by another agent.

III. NOTHING ABOUT THE NATURE OF NEGLIGENT POLICE RECORDKEEPING JUSTIFIES CREATING AN EXCEPTION TO THE EXCLUSIONARY RULE.

Police officers are expected to make arrests and conduct searches when those activities might discover evidence of criminality that can be used in a prosecution. If illegal arrests and searches could produce such evidence, the police would have an obvious incentive to conduct them. *Elkins v. United States*, 364 U.S. 206, 217 (1960). Accordingly, as this Court has frequently explained, "the exclusionary rule was adopted to deter unlawful searches by police." *Illinois v. Gates*, 462 U.S. 213, 263, (1983) (White, J., concurring). Because evidence resulting from unlawful searches cannot be used to obtain a conviction, *Weeks v. United States*, 232 U.S. 383, 398 (1914), the exclusionary rule provides a powerful and essential counter-incentive for police to respect constitutional bounds.

The rationale for the exclusionary rule applies with full force to cases involving arrests and searches for which the sole basis is officers' reliance on outdated, inaccurate, and negligently maintained police records. If evidence seized pursuant to arrests based on inaccurate reports regarding the existence or status of a warrant could be used in criminal prosecutions, perverse and dangerous incentives would arise with respect to police recordkeeping procedures. Applying the exclusionary rule counteracts those incentives by refusing to allow law enforcement to profit from its own faulty recordkeeping. Indeed, particularly when it comes to

negligent recordkeeping, there are no effective alternatives to the exclusionary rule that can provide appropriate deterrence.

A. Permitting the Introduction of Evidence Obtained Because of Law Enforcement's Own Negligent Recordkeeping Would Create Perverse Incentives for Police Departments.

1. This case reflects a stark fact: only because the Dale County Sheriff's Department failed to keep accurate records regarding the status of warrants were police officers able to arrest, and search, petitioner. Police negligence, in short, enabled the discovery of evidence that would otherwise have been outside the reach of the police, who were familiar with petitioner (and indeed, had appeared at his house only a short time before the events at issue here).

If this Court were to allow the introduction of evidence unlawfully seized under these circumstances, it would send a message to police departments that they are entitled to rely on outdated, bloated warrant records as the basis for stopping, arresting, and searching individual citizens. This will afford police an attractive avenue to victory in the "often competitive enterprise of ferreting out crime." *Evans*, 514 U.S. at 15 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). And it will pose a significant threat to the privacy of countless individuals: The plaintiff in *Bowers v. Hardwick*, 478 U.S. 186 (1986), for example, was arrested while engaged in consensual sex in his own

bedroom by an officer who had come to serve a recalled warrant for failure to pay a fine.[11]

Individuals, in fact, are often temporarily subject to warrants, only to have those warrants recalled or quashed by a court. For example, fourteen percent of the arrest warrants processed by the federal Warrant Information Network in 2004 were dismissed by the court or returned unexecuted. U.S. Dep't of Justice, Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2004, at 16 (2006).[12] It is impossible to say with precision

---

[11] When told by Mr. Hardwick that the warrant was no longer good because the ticket had already been paid, the arresting officer replied, "It doesn't matter, because I was acting under good faith." Peter Irons, The Courage of Their Convictions 395-96 (1988).

[12] *See also* Randall Guynes & Russell Wolff, Un-served Arrest Warrants: An Exploratory Study (2004), *available at* http://www.ilj.org/publications/FinalWarrantsReport.pdf (last visited May 7, 2008). This study, commissioned by the National Institute of Justice, looked, among other things, at all the warrants outstanding in a single county from March through August of 2001 and found that 184 warrants were "closed by countermand," *id.* at 15 – that is, "withdrawn by the court due to some legal error," *id.* at 16; another 278 warrants were "closed by return," a category that included warrants issued for failure to pay a fine that became "irrelevant" as a "result of the person paying the fine and court costs without having been arrested," *id.* Thus, in this one county, there were hundreds of warrants that could have caused unconstitutional arrests if police records failed to accurately reflect the status of warrants. An earlier study funded by the U.S. Congress' Office of Technology Assessment that examined a random sample of the warrants in the National Crime Information Center's "Wanted-Person System" found that 6.1 percent of the warrants on file had been cleared or vacated at least a year before the sample date. *See* Kenneth C. Laudon, *Data Quality and Due Process in*

how many such warrants still appear as active in police records, because neither federal nor state warrant databases have undergone recent public audits, but the available evidence is quite troubling.[13]

Providing effective incentives for law enforcement to maintain accurate records has also become more pressing because the number of cross-jurisdictional inquiries is increasing – and each inquiry potentially represents an unlawful arrest if the record system contains erroneous information. In FY 2005, the FBI reported that the number of

---

Large Interorganizational Record System, Communications of the ACM, vol. 29 no.1, at 4, 8 (Jan. 1986), *available at* http://portal.acm.org/citation.cfm?id=5466&dl=ACM&coll=ACM & CFID=26953034&CFTOKEN=64772422 (last visited May 7, 2008).

[13] An older report from the U.S. Congress' Office of Technology Assessment, *Federal Government Information Technology: Electronic Record Systems and Individual Privacy, OTA-CIT-296* (June 1986), reported that the FBI's audit of five states' records "indicated that an average of 5.5 percent of the NCIC wanted persons entries were invalid." *Id.* at 133-34. Alabama was one of the states included in this audit. *See* David Burnham, *F.B.I. Says 12,000 Faulty Reports on Suspects Are Issued Each Day*, N.Y. Times, Aug. 25, 1985, at 1 (also reporting that the F.B.I. projected 12,000 "invalid or inaccurate reports on suspects wanted for arrest" were being transmitted daily to federal, state, or local law enforcement agencies).

A more recent survey of related state-level databases containing criminal-history records reported in 2003 that 20 states had not been audited for data quality in the previous five years, and 22 reported that no audit was planned for the next three years. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2003, at 8 (2006).

transactions for the National Crime Information Center (which includes the Wanted Person database) was up by eighteen percent over FY 2004. Press Release, FBI, National Crime Information Center Sets New Record (Jan. 17, 2006), *available at* http://www.fbi.gov/pressrel/pressrel06/ncicrecord011706.htm (last visited May 7, 2008). Future increases in queries to various databases could dwarf the numbers seen so far, as automatic license plate recognition systems begin to be introduced in police departments around the country. Jacques Billeaud, *Infrared Cameras Help Police Scan for Trouble*, L.A. Times, Sept. 9, 2007, at B7. Such systems can visually scan and then check the records associated with seventy-five times more license plates than an officer would in a standard shift, *id.*, consequently exposing exponentially more citizens to the threat of an unlawful arrest.

2. The Eleventh Circuit's decision permitting the government to use the evidence in this case because the individual arresting officers were unaware either of the warrant's recall or of the flawed recordkeeping practices within the police department whose negligence led to the inaccurate report would give law enforcement a perverse incentive to structure its operations so as to leave officers in the field ignorant of the deficiencies in police record management. Evidence would certainly be suppressed if the officer were aware that a warrant were recalled and nevertheless conducted an arrest based on it. *Cf. Leon*, 468 U.S. at 923 (citing *Franks v. Delaware*, 483 U.S. 154 (1978) (suppression appropriate if affiant knew that information used to support warrant was false)). Evidence would presumably

also be suppressed if the arresting officer knew that a record-keeping system was improperly maintained, casting doubt on the accuracy of any report of a warrant and rendering reliance on it objectively unreasonable. *See Evans,* 514 U.S. at 17 (O'Connor, J., concurring); *cf. Leon*, 468 U.S. at 922. Therefore, to exploit the exception to the exclusionary rule adopted by the Eleventh Circuit, police departments would have an incentive to provide arresting officers with plausible deniability about inaccuracies in police records. Inhibiting communications between law enforcement agencies or even within a single police department is hardly a desirable outcome and can only lead to further errors in recordkeeping.

If the good faith of the actual arresting officer is all that is required to permit introduction of evidence seized during a search, this can create an intolerable incentive for police and police departments to organize themselves so as to manufacture such good faith. Police officers might be tempted to tell colleagues that a warrant was in force, when in fact, it had not yet even been sought, since their colleagues would then be entitled to act. *See, e.g.*, *People v. Fields*, 785 P.2d 611, 612 (Colo. 1990) (parole officer entered warrant into NCIC database when warrant had not yet been applied for). Police might set up their databases to return indications that warrants exist not only for the individuals actually named in a warrant but also for individuals with similar names, in the hope that this would permit a broader range of searches to which exceptions to the exclusionary rule would apply. *See, e.g.*, *United States v. Grayson*, 2006 U.S. Dist. LEXIS 44926 (N.D. Okla. June 30, 2006) (permitting

introduction of evidence found in warrantless search of Demario Grayson based on police database that automatically "linked" his name to a warrant issued for a different individual, Demarco Grayson). But this Court has consistently declared that it is unacceptable for law enforcement to deliberately evade a rule designed "to reduce the risk" of a constitutional violation. *Missouri v. Seibert*, 542 U.S. 600, 608 (2004) (internal quotation omitted) (noting that the facts in the case "reveal a police strategy adapted to undermine the *Miranda* warnings," *id.* at 616). Creating an exception to the exclusionary rule for warrantless searches when the search rests on inaccurate recordkeeping by law enforcement would invite just such evasions, as police departments might tailor their behavior to take full advantage of such a loophole.

3. Permitting the introduction of evidence obtained in searches like the one at issue here would undermine states' efforts to regulate their police departments. State high courts that have been presented with the question whether to exclude evidence unlawfully obtained as a result of inaccurate police recordkeeping have generally held that such evidence should be suppressed. And they have identified deterrence of negligent recordkeeping as the basis for requiring exclusion. *See, e.g., Hoay v. State*, 71 S.W.3d 573, 577 (Ark. 2002) ("If the touchstone of the exclusionary rule is deterrence of police misconduct, as *Leon* makes clear, that rule should apply equally to defective recordkeeping by law enforcement."); *People v. Willis*, 46 P.3d 898, 915 (Cal. 2002) ("[s]uppressing the fruits of an arrest made on a recalled warrant will deter further misuse

of the computerized criminal information systems and foster more diligent maintenance of accurate and current records") (quoting *People v. Ramirez*, 668 P.2d 761, 765 (Cal. 1983)); *Shadler v. State*, 761 So. 2d 279, 285 (Fla. 2000) ("if the exclusionary rule is not applied to evidence secured" due to law enforcement mistakes, state agencies will not "have an incentive to maintain records current and correct"); *State v. Allen*, 690 N.W.2d 582, 593 (Neb. 2005) ("[w]e conclude that the threat of exclusion is likely to cause police officers and dispatchers to exercise greater care").[14]

If this Court were to reject these states' approach, it would undercut that deterrence. Even in a state in which the state constitution, evidence code, or judicial policy continued to require that such evidence be suppressed, the federal government could use the evidence in a federal prosecution. But ever since *Elkins*, this Court has rejected the "silver platter doctrine," recognizing that "when a federal court . . . admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution." 364 U.S. at 221.

4. Finally, this Court should adhere to its longstanding conception of the exclusionary rule in

[14] The only case holding to the contrary, *Harvey v. State*, 469 S.E.2d 176, 179 (Ga. 1996), held that the underlying arrest did not violate the Fourth Amendment in the first place. That court apparently did not recognize that *Whiteley* clearly rejects that position.

light of the potential for an even greater number of record-generated constitutional violations in the future. The problem of inaccurate police and law enforcement recordkeeping is already a significant issue, as the reported cases show.[15] These cases,

---

[15] Inaccurate record-keeping by police departments frequently triggers stops, searches, and arrests. *E.g.*, *United States v. Gines-Perez*, 90 Fed. App'x 3 (1st Cir. 2004); *United States v. Williams*, No. 97-4849, 1998 WL 276460 (4th Cir. May 27, 1998); *United States v. Anderson*, No. 4:07cr0023, 2007 WL 4732033 (N.D. Ohio June 21, 2007); *United States v. Grayson*, No. 06-CR-0086, 2006 WL 1836004 (N.D. Okla. June 30, 2006); *United States v. Parker*, No. 99-CR-123, 1999 WL 997282 (E.D.N.Y. 1999); *Park v. Valverde*, 61 Cal. Rptr. 3d 895 (Cal. Ct. App. 2007); *People v. Fields*, 785 P.2d 611, 614 (Colo. 1990); *State v. White*, 660 So. 2d 664 (Fla. 1995); *Jibory v. City of Jacksonville*, 920 So. 2d 666 (Fla. Dist. Ct. App. 2005); *State v. Murphy*, 793 So. 2d 112 (Fla. Dist. Ct. App. 2001); *Best v. State*, 817 N.E.2d 685 (Ind. Ct. App. 2004); *Commonwealth v. Vaughn*, 117 S.W.3d 109 (Ky. Ct. App. 2003); *Ott v. State*, 600 A.2d 111, 117, 119 (Md. 1992); *State v. Diloreto*, 850 A.2d 1226 (N.J. 2004); *People v. McElhaney*, 552 N.Y.S.2d 825 (N.Y. Sup. Ct. 1990); *Joyner v. Taylor*, 968 S.W. 2d 847 (Tenn. Ct. App. 1997); *White v. State*, 989 S.W. 2d 108 (Tex. App. 1999); *State v. Mance*, 918 P.2d 527 (Wash. Ct. App. 1996); *State v. Williams*, 583 N.W. 2d 673 (Wis. Ct. App. 1998) (unpubl.).

There are also many cases in which the erroneous information is chargeable to the police, because the negligent record-keeper is an adjunct to the law enforcement team. *E.g.*, *People v. Willis*, 46 P.3d 898 (Cal. 2002); *People v. Ferguson*, 134 Cal. Rptr. 2d 705 (Cal. Ct. App. 2003); *People v. Spence*, 132 Cal. Rptr. 2d 621 (Cal. Ct. App. 2003) (unpubl.); *People v. Knight*, No. CO38928, 2002 WL 31372151 (Cal. Ct. App. Oct. 22, 2002) (unpubl.); *People v. Ridge*, 57 Cal. Rptr. 2d 255 (Cal. Ct. App. 1996) (unpubl.); *Shadler v. State*, 761 So. 2d 279 (Fla. 2000); *Austin v. State*, 965 So. 2d 853 (Fla. Dist. Ct. App. 2007); *Eldridge v. State*, 817 So.2d 884 (Fla. Dist. Ct. App. 2002); *State v. Sands*, 802 So. 2d 417 (Fla. Dist. Ct. App. 2001); *State v. Hisey*, 723 N.W. 2d 99 (Neb. Ct. App. 2006).

though numerous, undoubtedly represent only a small fraction of the unlawful searches actually taking place, as many such searches will produce no incriminating evidence – hardly a surprising result, given that the searches are based on warrants that have been recalled after a judicial officer has concluded that they were no longer necessary or appropriate – and many other searches will not produce reported opinions.

This Court should confirm that the exclusionary rule applies to evidence obtained as a result of negligent police recordkeeping errors just as it applies to evidence obtained as a result of other law enforcement illegalities. Such a holding would keep in place the appropriate incentive for law enforcement entities to improve their records management systems, thus striving to prevent unlawful arrests. When government agencies have an incentive to keep accurate records, they take steps to accomplish that goal. And if they do not do so, they certainly do not deserve to be rewarded. What apparently has been lacking with respect to some law enforcement databases is a strong incentive to accuracy, which this Court can now reaffirm.

B. No Alternative to Exclusion Can Produce Sufficient Incentives to Prevent Future Fourth Amendment Violations From the Use of Inaccurate Police Warrant Records.

Without any prompting from the government, the Eleventh Circuit *sua sponte* advanced five reasons why it thought that the exclusionary rule is unnecessary to deter negligent law-enforcement

recordkeeping. None of them stands up to scrutiny. Indeed, expanding the *Leon* and *Evans* exception to cover the police's own recordkeeping errors would effectively swallow the exclusionary rule.

1. The Eleventh Circuit first suggested that legal rules cannot deter negligence "because only if the decision maker considers the possible results of her actions can she be deterred." Pet. App. 10a. This is a bizarre suggestion. Much of the edifice of modern tort law is built upon the understanding that the prospect of future liability will provide incentives for regulated actors to take the appropriate level of care – that is, to behave non-negligently.

This Court's exclusionary rule jurisprudence likewise is predicated on the notion that an unlawful search, "whether deliberate or negligent, can produce nothing usable against the person aggrieved by the invasion." *Alderman v. United States*, 394 U.S. 165, 176 (1969); *accord Michigan v. Tucker*, 417 U.S. 433, 447 (1974) (noting that the exclusionary rule's deterrent force presupposes willful or negligent police conduct that can be altered by the incentives the rule creates).

This result makes perfect sense. As the state courts that have reviewed searches based on slipshod law-enforcement recordkeeping have recognized, *see supra*, pp. 38-39, the exclusionary rule provides a powerful incentive for maintaining accurate records – that is, for avoiding negligence.

To be sure, once the negligent recordkeeping has already occurred and led to incorrect information being reported to officers in the field, there may be no way of preventing a particular unconstitutional

arrest The arresting officers in this case believed that a valid warrant still existed and so they arrested petitioner. But the appropriate perspective from which to consider the deterrent effects of excluding evidence based on police department negligence is *ex ante*, not *ex post*.

Petitioner's unconstitutional arrest was the product of negligence somewhere within the law enforcement bureaucracy: the negligence of the sheriff's department in failing to establish proper procedures for accurate recordkeeping, or the negligence of an individual department employee who failed to correct the record when the warrant was recalled, or both. The conduct of the arresting officers further contributed to the constitutional violation. Despite petitioner's telling them that the purported arrest warrant was no longer active, *see* J.A. 63, the officers insisted on arresting him without waiting for the few minutes necessary to confirm the existence of an active warrant. Had the relevant sheriff's departments recognized ahead of time that evidence gained from arrests under the penumbra of a warrant long since recalled would be inadmissible at trial, that awareness could well have prompted them to maintain more accurate files (that is, to avoid negligent recordkeeping) in order to avoid wasting time on cases that would ultimately be dismissed once the discovered evidence was suppressed.

2. The court of appeals also suggested a possibility of reprimand or other discipline sufficient to ensure that police personnel keep records current. Pet. App. 10a. But internal discipline is always available for constitutional violations. Nothing in

the court of appeals' analysis even remotely explains why it should be sufficient for this form of police negligence when all other forms continue to be governed by the exclusionary rule.

In any event, the court of appeals failed to offer any factual support for its assertion that internal discipline might address the problem here, and common sense suggests the contrary. A department's incentives to discipline or reprimand negligent employees depend on their actions being something the department desires to deter. If employees' negligence leads to the discovery of admissible evidence that otherwise would be unavailable – as it will if this Court abandons the exclusionary rule for these cases – then departments engaged in the competitive enterprise of ferreting out crime might tacitly condone, rather than condemn, employee laxity. This will be particularly true if, as we show in the next subsection, there is little likelihood of civil liability either.

Moreover, as this case illustrates, there is a serious practical problem facing even departments inclined to reprimand or discipline negligent employees. At least to this point, the employee who failed to make the proper changes to Dale County's records has not been identified. Indeed, it is unclear whether he or she is even identifiable. How, then, can there be any discipline? The larger and more bureaucratic a department, the harder it may be to identify the responsible employee.

3. The court of appeals also asserted that the "possibility of civil liability" might provide an appropriate level of deterrence for sloppy

recordkeeping if "the failure to keep records updated results in illegal arrests or other injury." Pet. App. 10a. Once again, however, the same could be said of other Fourth Amendment violations based on other kinds of law enforcement errors. Yet the Eleventh Circuit offers no reason for treating recordkeeping errors leading to unconstitutional arrests and searches differently.

Indeed, whatever the merits of general arguments about civil liability for Fourth Amendment violations, sloppy recordkeeping cases are a *particularly* unlikely candidate for using 42 U.S.C. § 1983 damages suits to deter unconstitutional conduct.

As we have already explained, it will often be extremely difficult for an aggrieved individual even to detect who is responsible for the crucial error. When there are "many different people who have access to these warrants," J.A. 60, identifying the person who omitted to update the records will be impractical. And there may be a serious question of causation: can a records clerk who failed to update a record in February be held personally responsible for an arrest carried out in July given the number of intervening actors and events? Can such a clerk even be said to have violated a § 1983 plaintiff's constitutional rights?

Ultimately, the sheriff is responsible for failing to establish and enforce adequate recordkeeping procedures. But in a state like Alabama, he cannot be held accountable in his official capacity, since he is considered a state policymaker, and therefore not amenable to suit under § 1983. *See McMillian*, 520

U.S. at 783 (affirming dismissal of § 1983 suit against county for sheriff's actions in suppressing exculpatory evidence with regard to criminal defendant).

As for the arresting officers, their belief in the existence of a valid warrant will almost certainly provide them with qualified immunity, despite the undoubted constitutional violation. *See, e.g.*, *Wilson v. City of Boston*, 421 F.3d 45 (1st Cir. 2005); *Duckett v. City of Cedar Park*, 950 F.2d 272, 280 (5th Cir. 1992); *v. Bzdel*, 214 F. Supp.2d 69, 74-76 (D. Mass. 2002); *Lauer v. Dahlberg*, 717 F. Supp. 612, 613 (N.D. Ill. 1989); *aff'd*, 907 F.2d 152 (7th Cir. 1990); *see also Mitchell v. Aluisi*, 872 F.2d 577 (4th Cir. 1989) (addressing a due process claim, not a Fourth Amendment claim); *Mason v. Village of Babylon*, 124 F. Supp. 2d 807, 815 (E.D.N.Y. 2000) (same).[16] Unless and until it becomes clear to them that a particular department's records are consistently inaccurate, both they, and the departments that employ them, will remain insulated from liability, and thus from the deterrence that civil liability provides.

4. The court of appeals also asserted, again without any support, that departments face strong incentives to maintain timely records because

---

[16] It would be difficult for a defendant in an individual criminal proceeding to ascertain the internal recordkeeping procedures of the arresting agency and establish that the recordkeeping system had a sufficiently well-known history of errors to render reliance on it by the arresting officer objectively unreasonable. And the burden of conducting discovery and litigation over this issue at every such suppression hearing could be substantial.

"inaccurate and outdated information is just as likely, if not more likely, to hinder police investigations as it is to aid them." Pet. App. 10a. But this case shows why that hypothesis is debatable, at best, particularly when it comes to records indicating that an individual is the subject of an arrest warrant. The presence of stale arrest warrants within a police department's files imposes no obligation on a department. Police departments face no enforceable duty to pursue every warrant vigorously. After all, for the six months between January and July 2004, neither the Dale County nor the Coffee County sheriff's departments made any effort to execute the warrant ostensibly still in the Dale County department's files, despite the fact that petitioner was well known to local law-enforcement officials, who were able to locate him at his house. *See* J.A. 64-65. But when Investigator Anderson decided he wanted to confront petitioner, the long-dormant warrant provided a basis for an otherwise unjustifiable arrest and search. The purpose of the exclusionary rule is to deny law enforcement any benefit from this sort of unjustified action.

5. Finally, the court of appeals suggested that deterrence is unlikely to work when "the exclusionary sanction would be levied not in a case brought by officers of the department that was guilty of negligent recordkeeping, but instead it would scuttle a case brought by officers of a different department in a different county." Pet. App. 11a. This suggestion is particularly puzzling: after all, this is a *federal* prosecution, and the United States was involved in neither the negligent recordkeeping nor the unconstitutional arrest.

In any event, as we have already explained, *supra* pp. 25, 28-29, the Eleventh Circuit's decision cannot be squared with this Court's rejection of the "silver-platter doctrine." and the court of appeals provided no argument for revisiting the well-established principle that federal prosecutors cannot use evidence obtained unconstitutionally by state or local police, which serves the deterrent purposes of the exclusionary rule. *See Elkins v. United States*, 364 U.S. at 217.

* * *

Applying the exclusionary rule is appropriate and necessary here, where police failed to heed the directive of a court, months earlier, to disregard a now-invalid warrant. This Court's precedents demonstrate that this law enforcement misconduct should be deterred by suppressing the resulting evidence, so as to preserve the liberty and privacy guaranteed to all citizens by the Fourth Amendment. Choosing instead to expand the *Leon-Evans* exception to allow law enforcement to benefit from its own negligence would be to embark on a dangerous path, creating unwise incentives for police and inviting disregard for the Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Ronald W. Wise
2000 Interstate Park Dr.,
Suite 105
Montgomery, AL 36109

Thomas C. Goldstein
AKIN, GUMP, STRAUSS
HAUER & FELD LLP
1333 New Hampshire
Ave, N.W.
Washington, DC 20036

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave., Suite 300
Bethesda, MD 20814

May 9, 2008